LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1717

WALTER E. FRITZ and
RAMONA J. FRITZ,

Petitioners,

v.

THE TOWN OF CLERMONT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

WILLIAM E. ROBERTS
JACK H. ROGERS
RONALD R. SNYDER

ROBERTS, RYDER & ROGERS
Suite 2020
One Indiana Square
Indianapolis, Indiana 46204

Counsel for Respondent

INDEX

Page

Opinion Below 2

Question Presented 2

Statement of Case

I. Installation of Indianapolis Sanitary District Interceptor Sewer and Town Trunk Sewer Across Petitioners' Property 2

II. Installation of Trunk and Main Sewer Lines by Town 3

Summary of Argument 5

Argument

I. The Board of Trustees of the Town, a trial court and two separate Indiana appellate tribunals found the benefits exceeded the assessment. 7

II. Findings of Town Board of Trustees, Trial Court and Court of Appeals of Indiana all show there was a finding of special benefits. 8

III. Act of local and state authorities not arbitrary and did not constitute a denial of due process. 10

Conclusion 11

TABLE OF AUTHORITIES

Cases: *Page*

Bauman v. Ross (1897) 167 U.S. 548 10

Butters v.City of Oakland (1923) 263 U.S. 162 .....9, 11

Fallbrook Irrigation District v. Bradley
(1896) 164 U.S. 112 10

French v. Barber Asphalt Paving Co.
(1901) 181 U.S. 324 10

Fritz v. Town of Clermont (1973) ___ Ind. App. ___,
292 N.E. 2d 258 .....2, 4, 8

Garvin v. Baussman (1880) 114 Ind. 429, 16 N.E. 826 10

Houck v. Little River Drainage District
(1915) 239 U.S. 254 .....9, 10

United States Constitution.
Amendment 14, §1 ..... 2, 7

Miscellaneous.
United States Supreme Court Rule 23.1.(f) 5, 7

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1717

WALTER E. FRITZ and
RAMONA J. FRITZ,

Petitioners,

v.

THE TOWN OF CLERMONT,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

Comes now the Respondent Town of Clermont (hereinafter called "Town"), and respectfully prays that the Court deny the Petitioners' request for a Writ of Certiorari to review the judgment of the Court of Appeals of Indiana.

OPINION BELOW

(1) The opinion of the Court of Appeals of Indiana is reported at 292 N.E.2d 258.

(2) A petition for rehearing before the Court of Appeals of Indiana was denied on March 21, 1973, as reported at 292 N.E.2d 258.

(3) The Supreme Court of Indiana denied a petition to transfer this case from the Court of Appeals of Indiana on February 19, 1974.

QUESTION PRESENTED

Whether the fixing of a sewer assessment on Petitioners' property by the Town was palpably arbitrary and a plain abuse of discretion which amounted to a taking of Petitioners' property without due process of law contrary to the United States Constitution Amendment 14, Section I?

STATEMENT OF CASE

I.

Installation of Indianapolis Sanitary District Intercepter Sewer and Town Trunk Sewer Across Petitioners' Property

Respondent Town is an Indiana municipal corporation. The Petitioners, in 1968, owned 32.7 acres of land within the corporate limits of the Town. On June 1, 1967, Petitioners granted to the Indiananpolis Sanitary District (a separate municipal corporation) an easement for the purpose of installing an intercepter sewer across the southernmost portion of Petitioners' 32.7 acres. As a result of granting the easement, Petitioners were permitted to connect onto the Indianapolis sewer. The Petitioners' property was not assessed for the Indianapolis Sanitary District

Sewer. The intercepter sewer of the Indianapolis Sanitary District ran along the southernmost part of the 32.7 acre tract. The Town installed sewers within its corporate limits, including a trunk sewer line which bisected the entire 32.7 acre tract owned by Petitioners. The Petitioners' property at the time of the trial in this cause was being developed as an apartment complex.

II.

Installation of Trunk and Main Sewer Lines by Town

On May 17, 1966, the Stream Pollution Control Board of the State of Indiana ordered the Town to install sanitary sewers within the entire corporate limits of the Town.

On January 18, 1968, the Town passed certain improvement resolutions which provided that all trunk and main sewer lines were to be paid for by an area or district assessment. The area to be assessed was all property within the corporate limits of the Town. After proper notice, a public hearing was held to determine if the area was properly bounded and if the benefits within the area or district would exceed or equal the cost. The Petitioners did not attend this hearing or remonstrate. The boundaries of the area benefited, which included the Petitioners' land, was affirmed at this public hearing and the benefit was found to exceed or equal the cost.

After the area was fixed by the Town, bids were taken on the project. The bids were broken into three categories: (1) cost of trunk sewers, (2) cost of main sewers and (3) cost of local sewer (a local sewer is designed to serve abutting properties while a trunk or main sewer is designed to serve an area larger than the abutting property). The cost of the trunk and main sewers was to be paid for by an area assessment on all property

within the Town, including the Petitioners' property. The cost of local sewers was not included in this assessment nor was the Petitioners' land assessed for local sewers.

Notwithstanding the Petitioners' contention, the *facts* show the area assessment for each parcel in the area (the Town) was computed in exactly the same manner and entered on the final assessment roll in the same manner. The Town Board of Trustees at a hearing, after notice, specifically confirmed the assessment roll and stated in the confirming resolution the special benefits were equal to or exceeded the assessment. After the final assessment roll was confirmed, the Petitioners filed a remonstrance. The Town gave the Petitioners a hearing, and after hearing confirmed the assessment against Petitioners' property.

Petitioners then filed an action in the Superior Court of Marion County, Indiana requesting that the assessment be set aside. After a full trial, *de novo,* the Superior Court of Marion County affirmed the assessment levied by the Town against the Petitioners' land.

The Court of Appeals of Indiana, in a unanimous decision, affirmed the holding of the Superior Court of Marion County in fixing the assessment on Petitioners' land. (*Fritz v. Town of Clermont* (1973) ____Ind. App.____, 292 N.E.2d 258). In their opinion, the Indiana Appellate Court stated:

"Appellants do not contend that the apportionment of the cost of the trunk and main sewers is contrary to the provisions of § 48-3957, *supra.* Rather, the thrust of their contention is that the Town failed to consider the special benefits to their land in light of the pre-existing sewer in making the assessment.

The concept of 'special benefits' encompassed within the statutes here in question was given lengthy consideration in *Indiano v. City of Indianapolis* (1971), ____ Ind. App. ____, 269 N.E. 2d 552, 25 Ind. Dec. 455. *Indiano* relies on *Hubenthal, et al. v.*

Grain, et al. (1959), 239 Ind. 646, at 650, 159 N.E. 2d 850, at 852-853, wherein it is stated:

" 'In determining whether lands are benefited, special benefits only may be considered, and not the general benefits which accrue to the landowner as a member of the community. Benefits are special when they increase the value of the property, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.

" '. . . it is not necessary that the benefits be direct and immediate to justify an assessment. Future possibilities, if any, as well as collateral or indirect benefits, may be considered.' 10 I.L.E., Ditches and Drains, pp. 503, 504. *Cleveland, C., C. & St.L.Ry. Co. v. Mumford* (1935), 208 Ind. 655, 197 N.E. 826; *Watson v. Armstrong* (1913), 180 Ind. 49, 102 N.E. 273; * * *.'

"A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of appellants are less than the amount assessed." 292 N.E. 2d at 261-262.

A petition for rehearing before the Appellate Court of Indiana was denied on March 21, 1973, and likewise a petition to transfer the case to the Supreme Court of Indiana was denied on February 19, 1974.

SUMMARY OF ARGUMENT

(1) The Petitioners failed to comply with Supreme Court Rule 23.1.(f) and thus do not properly raise any federal question.

(2) Both the Town Board of Trustees, and the Superior Court of Marion County, Indiana, (in a trial *de novo*), found, *as a fact,* that the benefits were equal to or exceeded the assessment on Petitioners' property. This finding was affirmed by the Court of Appeals of Indiana, and the Indiana Supreme Court. In levying an assessment, the Town was acting in a legislative

capacity and the Court's review in such a case is limited to a determination of whether the Town's action was palpably arbitrary and a plain abuse of discretion. In this case, the courts found it was not.

(3) The determination of whether benefits were equal to or exceeded the assessment is a factual issue depending on the case. This fact has already been determined by the Indiana courts. This Court should not grant the requested review when the whole of the Petitioners' argument rests on a narrow factual issue already resolved.

ARGUMENT

It should be noted at the outset that the Petitioners failed to comply with United States Supreme Court Rule 23.1.(f) by failing to set forth in the Statement of the Case at what stage of the proceedings the federal question was raised, how it was raised and how it was passed on by the Indiana courts. The Rule requires quotations of specific portions of the record or summaries thereof to show these matters. In the Petitioners' petition, there is no attempt to comply with Rule 23.1.(f) and thus no showing that any federal question was timely and properly raised.

Assuming, *arguendo,* the Petitioners complied with Rule 23.1.(f), the only question raised by the petition for writ of certiorari is whether the fixing of an area sewer assessment on Petitioners' property amounted to the taking of their property without due process of law in violation of the Fourteenth Amendment, Section I of the United States Constitution. All three issues raised by the Petitioners in their petition are interrelated and deal with this one issue. But since the Petitioners have raised three separate issues, this brief will address itself to each issue.

I. *The Board of Trustees of the Town, a trial court and two separate Indiana Appellate tribunals found the benefits exceeded the assessment.* The sole ground of the Petitioners' argument, that the assessment violated the Fourteenth Amendment, is that the installation of the Town's sewer, which bisected their property, did not confer a special benefit since there was another sewer which ran along the southernmost portion of the Petitioners' 32.7 acre tract. Whether or not the Petitioners' land was benefited by the installation of the Town's sewer is a question of fact and the Town Board of Trustees found as a fact the benefits exceeded the assessment. The Superior Court of Marion County, Indiana

(after a trial *de novo*) also found, as a fact, the benefits exceeded the assessment. The Court of Appeals of Indiana, in affirming the trial court stated:

> "A thorough search of the record before us reveals no evidence that the special benefits flowing to the land of the appellants are less than the amount assessed." 292 N.E.2d at 262.

As the Indiana Court of Appeals properly noted, the mere existence of the Indianapolis intercepter sewer crossing a portion of Petitioners' land does *not* preclude any benefit from attaching. The issue of benefits is one of fact which depends on the particular case involved. In this case the facts show the existing intercepter sewer of the Indianapolis Sanitary District served only the southern portion of the Petitioners' land and the trunk line installed by the Town bisected the entire 32.7 acres. Also, the Petitioners, at the time of the trial, were in the process of selling the 32.7 acres for use as an apartment complex.

To argue, as the Petitioners do, that their property received no benefits at all is directly contrary to the facts as found by the Town Board of Trustees, the Superior Court of Marion County and the Court of Appeals of Indiana. There is no factual finding by any court or other agency that the benefits received were less than the assessment, let alone any finding that the land was not benefited at all. Rather, all the facts are to the contrary. The Petitioners' first argument would have this Court make factual findings different than those made by the Trial Court—the trier of facts in the case. This Court has repeatedly indicated it will not review narrow factual questions and, certainly will not upset factual issues previously determined, redetermined, affirmed and reaffirmed.

II. *Findings of Town Board of Trustees, Trial Court and Court of Appeals of Indiana all show there was a finding of special*

benefits. The second question raised by the Petitioners is nothing more than a restatement of the first and, as already indicated above, the Board of Trustees of the Town, the Marion County Superior Court and the Court of Appeals of Indiana all found that the benefits to Petitioners exceeded the sewer assessment. This is all that is required. It is not necessary there be an exact mathematical determination that the benefits are so much in dollars and cents compared to the assessment but only that benefits are equal to or exceed the assessment.

In *Butters v. City of Oakland* (1923) 263 U.S. 162, the plaintiff made an argument similar to Petitioners. This Court stated:

> ". . . We are not impressed with his contention. It is not unreasonable to assume that ordinarily the cost of street grading and paving, within municipalities such as this statute deals with, will not exceed the benefits which the adjoining land owners will receive . . . *the method of assessment provided for is an old and familiar one and embodies a principle too well established to be overturned by the suggestion of a theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances.*" (Emphasis added) 263 U.S. at 166.

Also, in *Houck v. Little River Drainage District* (1915) 239 U.S. 254, where the area assessment was 25¢ per acre, this Court had this to say about assessments:

> "When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case *there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, footage, area, market value, or to benefits estimated by commissioners* . . . [cited cases]." 239 U.S. at 265.

Thus, the second argument raised by the Petitioners is the same as the first and asks this Court to review and overturn a narrow factual issue which is limited to the facts of this case.

III. *Act of local and state authorities not arbitrary and did not constitute a denial of due process.* The Petitioners take the somewhat tenuous position that the Town Board of Trustees, the Superior Court of Marion County, the Court of Appeals of Indiana (twice, both at the time of the original hearing and on petition for rehearing) and the Indiana Supreme Court acted arbitrarily in upholding the assessment against the Petitioners' property. The Petitioners must take this position because of the scope of review in a case such as this is limited to a determination of whether the assessment is palpably arbitrary and a plain abuse of discretion. The Town, in fixing the assessment, was exercising a legislative function delegated to it by the Indiana Legislature. *Garvin v. Baussman* (1880) 114 Ind. 429, 16 N.E. 826. In *Houck v. Little River Drainage District* (1915) 239 U.S. 254, this Court noted it will not interfere with the determination of an assessment unless the action is palpably arbitrary and a plain abuse of discretion:

> "The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, *the legislature may itself fix the basis of taxation or assessment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions.* (numerous cites omitted)." 239 U.S. at 262.

There are numerous other such cases including: *Fallbrook Irrigation District v. Bradley* (1896) 164 U.S. 112, 169, where this Court termed the question of fact as to benefits as "a mere question of legislative discretion"; *Bauman v. Ross* (1897) 167 U.S. 548, 590, where this Court noted the "rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature"; *French v. Barber Asphalt Paving Co.* (1901)

181 U.S. 324, 338, where this Court stated: "The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must, of course, be final"; and *Butters v. City of Oakland* (1923) 263 U.S. 162, wherein the plaintiff's argument that the assessment exceeded benefits was rejected in the following fashion:

> ". . . [T]he municipal authorities were empowered to establish the district benefited and to assess the tax in proportion to the benefits. Ample provision is made for a hearing and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or fraudulently. The assessment was reviewed upon appeal by the city counsel . . . *Its action, under the statute, was final and conclusive and it is not open to attack in this proceeding.*" (Emphasis added) 263 U.S. at 164-165.

There is certainly nothing to indicate that any of the tribunals in this case acted arbitrarily or capriciously in affirming the sewer assessment against the Petitioners' land in light of the particular facts in this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

WILLIAM E. ROBERTS
JACK H. ROGERS
RONALD R. SNYDER

ROBERTS, RYDER & ROGERS
Suite 2020
One Indiana Square
Indianapolis, Indiana 46204

Counsel for Respondent